Office-Supreme Court, U.S.
FILED
MAY 13 1985
ALEXANDER L. STEVAS,
CLERK

(3)

NO. 84-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

– against –

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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12 pp

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in stating that the "clear and convincing" standard of proof of actual malice in a public figure libel action should not be applied in deciding a defendant's motion for summary judgment?

2. Was the Court of Appeals correct in holding that the "libel proof" doctrine is inapplicable to the respondents?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. Liberty Lobby, Inc. is a nonprofit District of Columbia corporation. It is affiliated with Cordite Fidelity Corporation, a District of Columbia corporation.

TABLE OF CONTENTS

Page

Questions presented ..... (i)
The Parties ..... (ii)
Opinions Below 2
Jurisdiction 2
Statutory Provision Involved 2
Statement of the Case 2
Reasons for Granting the Writ 4

1. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT A DISTRICT COURT JUDGE SHOULD NOT APPLY THE "CLEAR AND CONVINCING" STANDARD OF PROOF OF ACTUAL MALICE IN DECIDING A MOTION FOR SUMMARY JUDGMENT IN A LIBEL SUIT, AND THERE IS NO REAL CONFLICT BETWEEN THAT HOLDING AND THE POSITIONS OF OTHER CIRCUIT COURTS. 4

2. THE COURT OF APPEALS WAS CORRECT, AND WAS IN AGREEMENT WITH THE OTHER CIRCUITS, IN HOLDING THE "LIBEL PROOF" THEORY INAPPLICABLE TO THE FACTS OF THIS CASE. 6

Conclusion 7

TABLE OF CASES

Pages

Bose Corp. v. Consumers Union of the U.S., Inc.,
_____ U.S. _____, 104 S.Ct. 1949 (1984) 5

Hutchinson v. Proxmire,
443 U.S. 111 (1979) 5

Nader v. de Toledano,
408 A 2d31 (D.C. App. 1979) 5,6

Westmoreland v. CBS, Inc.,
596 F.Supp. 1170 (S.D.N.Y. 1984) 6

Yiamouyiannis v. Consumers Union of the U.S., Inc.,
619 F.2d. 932 (2nd Cir. 1980) 5,6

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Respondents, Liberty Lobby, Inc. and Willis A. Carto, respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on November 2, 1984.

OPINIONS BELOW

JURISDICTION

STATUTORY PROVISION INVOLVED

Respondents accept the Petitioners' statements on these points.

STATEMENT OF THE CASE

The Respondents accept the Statement of the Case presented by the Petitioners, with the following exceptions and additions:

The publications of the Petitioners did not recount "the history and views" of the Respondents. (*Petition*, p. 6.) The publications were filled with falsehoods and distortions which presented an extremely inaccurate and damaging picture of the Respondents.

The Petitioners' publications went beyond falsely calling the Respondents neo-Nazi, fascist, anti-Semitic, and racist. (*Petition*, p. 6.) Petitioners also made the following maliciously false assertions, all of which have been ordered by the Court of Appeals to be tested before a jury in a libel trial: that Respondent Carto owns a company which is paid $6,000 rent per month by Respondent Liberty Lobby, Inc. (*Appendix to Petition*, p. 67-a); that Carto created an organization whose purpose was the forced deportation of American blacks to Africa (*Id.* at 69-a); that Carto looks like and imitates Adolf Hitler and joined in the singing of the "Horst Wessel Lied" (*Id.* at 71-a); that Carto conducts his business from a public telephone booth (*Id.* at 72-a); that a Carto organization supported G. Gordon Liddy's Congressional campaign (*Id.*); that Carto secretly observes prospective employees through a one-way mirror (*Id.*).

Petitioners also neglect to reveal that they relied on a virtually unknown informant for a number of their false statements about the Respondents. (*Id.* at 73-a-75-a.)

An employee of Petitioner Anderson, Joseph Spear, assigned and supervised the writing of the Petitioners' defamatory publications concerning the Respondents. It was this same Joseph Spear who in 1969 had co-authored an article in *True* magazine about the Respondents. The *True* article was a malicious attack on the Respondents, containing numerous false statements. The resulting libel suit was settled when *True* paid Carto a sum of money and published a favorable article about Liberty Lobby in *True*. When Spear assigned Charles Bermant to write the articles for *The Investigator* which brought about the present lawsuit, Spear gave Bermant the statements which had been made in the first *True* article from which to work. Bermant used some of those statements as the sole source for some of his statements in *The Investigator* articles. (*Id.* at 8-a-10-a.)

William McGaw, editor of *The Investigator*, told the magazine's president, prior to publication of the articles about the Respondents, that the articles were "terrible" and that the illustrations "could be libelous." (*Id.* at 13-a.)

Petitioners, on pages 8 and 9 of their Petition, give a misleading summary of the Court of Appeals opinion when they say that the Respondents, public figure libel plaintiffs, "would be excused from meeting" the "convincing clarity" standard of proof of actual malice at the summary judgment stage. The Court of Appeals did not "excuse" the Respondents from anything; the Court held that there was no duty—and could not reasonably be—for a libel plaintiff to meet the "clear and convincing" standard prior to presentation of all evidence at trial.

REASONS WHY PETITION SHOULD BE DENIED

1. The Court of Appeals was correct in holding that a District Court judge should not apply the "clear and convincing" standard of proof of actual malice in deciding a motion for summary judgment in a libel suit, and there is no real conflict between that holding and the positions of other circuit courts.

It is settled that at the trial of a libel action a public figure must prove actual malice with "convincing clarity." The Petitioners, however, would have this very demanding standard imposed on the libel plaintiff at the summary judgment stage—an illogical, impracticable, and unjust suggestion which the Court of Appeals correctly rejected.

The Petitioners repeatedly but falsely imply that the Court of Appeals was undertaking some reckless innovation when it said that the "clear and convincing" standard of proof could not be applied to the plaintiff's evidence on a defendant's motion for summary judgment. The Petition states that the Court of Appeals "invented" a "bifurcated burden of proof" (p. 19) and "created a special limitation" (p. 21).

On the contrary, the Court of Appeals was merely adhering to proper summary judgment principles, and it is the Petitioners who are advocating a novel precept which (though obviously helpful to them in this case) would if adopted stand the rational order of things on its head and make it virtually impossible for any public figure libel plaintiff to get to trial. The plain fact is that the Petitioners' notion would force the entire case to be tried before trial. A District Court judge cannot possibly evaluate whether a plaintiff can prove actual malice by clear and convincing evidence until the judge has seen all the evidence, and has heard and observed the witnesses. The opinion of the Court of Appeals in this case argues this point most effectively.

(*Appendix to Petition*, pp. 28-a-32-a.)

The issue of actual malice is a largely factual question which can reasonably be decided only after the plaintiff has had a chance to present all his evidence to a trier of fact. This Court has never implied otherwise. Indeed, this Court has said that "proof of 'actual malice' does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 & n.9 (1979).

Bose Corp. v. Consumers Union of the United States, Inc., _____ U.S. _____, 104 S.Ct. 1949 (1984), prominent in the Petition before this Court, deals with appellate review of defamation judgments entered after trial before a trier of fact and has nothing to do with summary judgments.

The Petitioners maintain erroneously that the Court of Appeals in this case is in conflict with other circuits. In fact the Petitioners make the remarkable statement that the Court of Appeals "stands in open conflict . . . with other courts which have continued routinely to apply the 'clear and convincing' standard at the summary judgment stage just as it is applied at trial or on motion for directed verdict . . ." (*Petition*, pp. 16-17.)

There is no evidence in the cases cited by Petitioners that "other courts" have actually applied the standard at all, much less "routinely." Petitioners rely heavily on *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2nd Cir. 1980), which in turn repeatedly relies on Nader v. de Toledano, 408 A.2d 31 (D.C. App. 1979). *Yiamouyiannis* is apparently self-contradictory. First that court approvingly quotes *Nader v. de Toledano* as saying that "the same principles applicable to normal summary judgment motions are applicable to such motions when made in a public figure libel action." (619 F.2d at 939.) Then the *Yiamouyiannis* court said that a judge in denying a defendant's summary judgment motion must con-

clude that a reasonable jury "could" find malice with convincing clarity. (*Id.* at 940). The *Yiamouyiannis* court then went on to rest its decision on a lesser standard than "convincing clarity," saying that "no showing has been made that the [allegedly defamatory statements] were published with actual malice, let alone a showing that achieves 'convincing clarity.' (*Id.* at 942.)

Both *Yiamouyiannis* and *Nader* are easily distinguishable on both law and facts from the present case. In *Westmoreland v. CBS, Inc.*, 596 F.Supp. 1170, 1177 (S.D.N.Y. 1984), it was stated that the *Yiamouyiannis* statement about "convincing clarity" and summary judgment "is a *dictum* that seems to overlook an important distinction . . ." [Emphasis supplied.]

The other cases cited on pages 17 and 18 of the Petition are devoid of relevancy to the question raised here.

It appears that the Court of Appeals in the present case would have reversed the District Court no matter which standard of proof was applied, simply because there were important unresolved issues of fact relating to the question of actual malice, but it is also clear that the Court of Appeals' position on the standard of proof to be used on summary judgment is correct and is not in conflict with the holdings of other circuits.

2. The Court of Appeals was correct, and was in agreement with the other circuits, in holding the "libel proof" theory inapplicable to the facts of this case.

The "libel proof" doctrine was not even reached by the District Court in rendering summary judgment, and when Petitioner nevertheless raised it at the appellate level the Court of Appeals disposed of it in no uncertain terms.

There is no issue here. The Petitioner has presented no

evidence that the Court of Appeals was incorrect or was in conflict with other circuits. Respondents rely on Judge Scalia's eloquent discussion of this point to refute Petitioners' argument—a discussion crowned by the statement, "We are not yet ready to adopt for the law of libel the principle that 10,000 repetitions are as good as the truth. We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth." (*Appendix to Petition,* p. 16-a.)

The Court, in essence, held that the door to an American courthouse should not be barred to anyone due to the unpopularity of his political views. In an effort to obfuscate this essential principle and to prejudice the courts against the plaintiff the defendant has relied upon false assertions made by the Anti-Defamation League of B'nai B'rith (ADL), a private hearsay-gathering organization which regularly makes allegations with confident assurances even when those assertions are lacking in truth. It is only at a trial of these issues that the truth or falsity of the ADL-based allegations can be tested by legal process.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

May 8, 1985

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